92-287

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1992

THOMAS G. WALLER AND MYRA L. WALLER, INDIVIDUALLY, AND THOMAS G. WALLER, AS THE ADMINSTRATOR OF THE ESTATE OF MICHAEL JEFFERY WALLER, DECEASED, AND MATTIE K. HAMILTON,

Plaintiffs-Appellants,

vs.

OZZY OSBOURNE; CBS, INCORPORATED; CBS RECORDS, ET AL.,

Defendants-Appellees.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW*

1. Whether the First Amendment to the Constitution would protect speech which incites or encourages minors to commit suicide?

2. Whether the advocacy of suicide by defendants to children is actionable where defendants knew that such advocacy would likely cause some children to actually commit suicide, and in this case, petitioners' children did in fact commit suicide as the proximate result of listening to defendants' music?

3. Whether the decision of the panel of the Eleventh Circuit Court of Appeals in this case affirming the District Court's decision, which granted summary judgment to Defendants is directly contrary to the rules as to placement of burden of proof on nonmovants as set forth by the Supreme Court of the United States in the case of *Adickes vs. S.H. Kress and Company*, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970), and *Celotex Corporation vs. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L. Ed. 2d 365 (1986)?

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* The names of all parties to the proceedings in the Court appear in the caption of the case.

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REFERENCE TO THE OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED IN THE CASE

Waller, et. al. vs. Osbourne, et. al., 736 F. Supp. 1144 (M.D. Ga. 1991) Orders of the United States District Court, Middle District of Georgia, dated May 6, 1991, and May 28, 1991.

Opinion of the United States Court of Appeals for the Eleventh Circuit, dated March 12, 1992.

Order of the United States Court of Appeals dated May 18, 1992.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

On March 12, 1992, a panel of the United States Court of Appeals for the Eleventh Circuit entered an order affirming the grant of summary judgment to Defendants/Appellees by the United States District Court for the Middle District of Georgia, dated May 28, 1991.

A petition for rehearing and a suggestion of rehearing en banc dated March 31, 1992, was timely filed by these Petitioners, Plaintiffs in the lower Court, and this was denied by the United States Court of Appeals for the Eleventh Circuit by order entered May 18, 1992.

Jurisdiction is conferred on the Supreme Court to review the judgment or decree in question by Writ of Certiorari by Rule 10 of the Supreme Court Rules, and by 28 USCA 1254.

THE CONSTITUTIONAL PROVISION INVOLVED

"Amendment 1 – Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances."

STATEMENT OF THE CASE

A. Waller Case: The Waller case involves an action for damages. He was a fan of Ozzy Osbourne and the cassette tape album "Blizzard of Oz" was found in his vehicle by his father shortly after his death. Plaintiffs, his parents, contend that his death was precipitated by incitement through the supraliminal words or the music "Suicide is the only way out, don't you know what it's all about", as well as the subliminal words contained in an interlude in the song as follows:

"Ah know people,

You really know where its at,

You got it,

Why try, why try,

Get the gun and try it,

Shoot, shoot, shoot". (R1, 23, 8)

Plaintiffs' original complaint was filed in the Superior Court of Ben Hill County, Georgia, but was removed by Defendants Osbourne and CBS Records, Inc. to the

United States District Court for the Middle District of Georgia on diversity of citizenship of the parties and all pertinent proceedings have taken place in that court.

It should be noted that initially the district court limited all discovery in the case to the question of whether there was a subliminal message on the cassette tape album version of the song "Suicide Solution". It should be noted that the questions of foreseeability and proximate cause were not addressed by the court nor was discovery had as to these matters.

In support of Plaintiffs' allegations, Plaintiffs presented two witnesses Martin Hall and Victoria Evans. Each of these witnesses testified that they had made exhaustive examinations of the cassette tape album "Blizzard of Oz" and the song "Suicide Solution", and both found that there were words in the interlude of the song which were below the threshold of conscious perception.

Without producing any experts to controvert Plaintiffs' experts Hall and Evans, Defendants filed a joint motion for summary judgment relying solely on the affidavits of Max Norman, who described the mixing process from the 24-track master to the eventual cassette tape, and Defendant Ozzy Osbourne, who simply described the circumstances at the time the song "Suicide Solution" was being recorded.

In opposition to these affidavits, Plaintiffs produced the affidavits of Phillip Alt, Plaintiff Thomas Waller, and Norman I. Perle. Phillip Alt testified without contradiction that he listened to the song "Suicide Solution" on a cassette tape album "Blizzard of Oz" five times and never heard any words during the interlude. (R3, 71, 27)

Plaintiff Thomas Waller testified as to a conversation with his son about two weeks before his death in which his son indicated that "Old Oz has the solution". (R3, 71, 30) Perle, an acknowledged expert in the area of sound recording, testified that he listened to the cassette tape album "Blizzard of Oz" and the song "Suicide Solution" nine times, but could only hear some of the words contended by Plaintiffs to be present subliminally in the interlude. (R3, 71, 33)

B. Hamilton Case: The Hamilton case arises out of the death of young Harold Matthew Hamilton, who died in March, 1988, from a self-inflicted gunshot wound. He was also a minor. The Hamilton case is virtually identical to the Waller case with one important exception. In Hamilton the allegations of the complaint are that young Hamilton was listening to a different version of the song "Suicide Solution" as found on the cassette tape album "Tribute to Randy Rhoads", but it was not alleged that there was a subliminal message found on the interlude of the song or on the tape itself. Like young Waller, Hamilton was a minor at the time of his death and the question in his case would be limited only to the question of whether the First Amendment would afford protection to the incitement of suicide to a minor.

The Defendants filed motions for summary judgment in both cases and the district court granted the motion. The cases were then consolidated for appeal to the Eleventh Circuit Court of Appeals where the opinion of the District Court was affirmed without further opinion by that court. Plaintiffs' motion for rehearing and for rehearing en banc were denied by order made and entered on May 18, 1992.

This application for certiorari is therefore being made to this honorable court.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE IS DIVERSITY OF CITIZENSHIP OF THE PARTIES AND DAMAGES IN EXCESS OF $50,000.00.

ARGUMENT

A. CERTIORARI SHOULD BE GRANTED IN ORDER TO ADDRESS THE SIGNIFICANT ISSUE AS TO WHETHER FIRST AMENDMENT PROTECTION SHOULD BE AFFORDED TO SPEECH THAT INCITES OR ENCOURAGES CHILDREN TO COMMIT SUICIDE.

Petitioners strongly contend that both the District Court and the Court of Appeals erred in failing to recognize that an exception should exist under the First Amendment as to speech directed to minors which encourages or incites to suicide. It is noted that both young Waller and young Hamilton were minors at the time of their deaths. The District Court limited discovery in the case to the single issue of whether or not a subliminal message existed on the tape recording of "Suicide Solution", and the District Court appeared to be ready to hold that subliminal messages, if present, would not be protected by the First Amendment. Only after a very involved review of the evidence did the District Court conclude that there was not a subliminal message on the tape of "Suicide Solution", but in its original order of May 6, 1991, failed to address the important issue as to

whether, regardless of the existence of subliminals, First Amendment protection should be afforded to speech directed toward minors which incited them toward suicide. Later the District Court did rule in Petitioner Hamilton's case on May 28, 1991, that such speech was not protected. The Eleventh Circuit Court of Appeals affirmed the District Court without opinion, and it has therefore left undetermined this very important aspect of both the petitioners' cases.

There can be no question but that the lyrics of the music incite toward suicide. Petitioners' original complaints set forth the lyrics and words of "Suicide Solution" as follows:

> "Wine is fine but whiskey's quicker
> Suicide is slow with liquor
> Take a bottle drown your sorrows
> Then it floods away tomorrows
>
> Evil thoughts and evil doings
> Cold, alone you hand in ruins
> Thought that you'd escape the reaper
> You can't escape the Master Keeper
>
> 'Cause you feel life's unreal and your're living a lie
> Such a shame who's to blame and you're wondering why
> Then you ask from your cask is there life after birth
> What you sow can mean Hell on this earth
>
> Now you live inside a bottle
> The reaper's travelling at full throttle
> It's catching you but you don't see
> The reaper is you and the reaper is me
>
> Breaking the laws, knocking doors
> But there's no one at home
> Made your bed, rest your head

But you lie there and moan
Where to hide, Suicide is the only way out
Don't you know what it's really about" (R1, 21, 29)

Following these lyrics are words Petitioner Waller contends were subliminal as follows:

"Ah know people,
You really know where its at,
You got it,
Why try, why try,
Get the gun and try it,
Shoot, shoot, shoot". (R1, 23, 8)

The District Court held that the latter words were not subliminal and, therefore, protected. However, the District Court, followed by the Court of Appeals, held that the First Amendment protected such speech when directed to minors, even though the Eleventh Circuit Court of Appeals had acknowledged a distinction as to children in its recent decision in *American Booksellers, et. al. vs. Webb*, 919 F. 2d 1493 (11th Cir. December, 1990). In that case, the Eleventh Circuit Court of Appeals reversed the ruling of the District Court for the Northern District of Georgia and determined that a Georgia statute (Official Code of Georgia Annotated, Section 16-12-102) making it a criminal offense to display in places accessable to minors any material deemed harmful to minors, was not violative of the First Amendment. The court weighed in heavily on the concept that a state may deny minors access to materials acceptable for adults, but unacceptable for minors, citing this court in *Ginsberg vs. New York*, 390 U.S. 629. It was noted that even where the statutes

have not been upheld against First Amendment challenges this Court has, however, recognized that some limitation on the access of adults to materials protected for them but harmful to minors is permissible. *Sable Communications of California, Inc. vs. F.C.C.*, 492 U.S. 115 (1989) and *Butler vs. Michigan*, 352 U.S. 380 (1958) (Invalidating statute banning reading materials inappropriate for children but implying that a statute "reasonably restricted to the evil with which it is said to deal" would be constitutional).

The state has an independent interest in the wellbeing of its youth and its power to control conduct of children reaches beyond the scope of its authority over adult. *Gere vs. Stanley*, D.C. PA 1973, F. Supp. 852, affirmed 453 F. 2d 205. Children in many instances have more limited rights under the First Amendment than do adults. *Russo vs. Central School District Number 1*, CANY 1972, 469 F. 2d 623, Cert. den. 410 U.S. 932.

There is a compelling parallel between Petitioners' contentions and those cases involving the application of the First Amendment to child pornography cases. In the case of *Osborne vs. Ohio*, 110 S. Ct. 1691 (1990), this Court upheld Ohio's prohibition against possession of nude photographs of minors as not violating the First Amendment on overbroad grounds. See also *State vs. Young*, 525 N.E. 2d 1365, 37 Ohio St. 3d 249, 110 S. Ct. 2605 (1988).

There can be no meaningful distinction between restriction or First Amendment rights where child pornography is involved, as opposed to such restriction to

inciting children to suicide. The basic compelling interest of society is the same, i.e., the protection of minors.

Petitioners' contentions are further bolstered by the recent and current concern over words contained in various so-called "rap" music, the most significant being the opposition to words by the rap group Ice-T, which seems to advocate shooting policemen. (See Macon Telegraph article dated July, 1992, copy of which is attached to this petition)

There is no reason why the same reasoning would not apply in the instant situation where the interest of the state in protecting children from exhortations or pandering or incitement to commit suicide would be such a substantial and important state interest as would merit exemption from First Amendment protection.

There can be no real contention made by Defendants or anyone else that the published non-subliminal lyrics of the song "Suicide Solution" found on all versions of the song are not patently offensive insofar as the advocacy of suicide to minors is involved. No reasonable construction of these lyrics can be made except to conclude that, in effect, you cannot escape the grim reaper, your life is unreal, you are living a lie, you should not worry about the afterlife since you have sown hell on earth, no one is going to come to your assistance, you make your own bed, but you get no satisfaction and only lie there and moan, there is no place to hide except for suicide, if you really know what it is about, suicide is the only way out, why try, get the gun and try it, shoot, shoot, shoot.

The Defendants' music further seeks to appeal to troubled adults and in particular minors. The message of

Osbourne's music is that life is filled with nothing but despair and hopelessness and that suicide is not only acceptable but desirable.

There has been an epidemic of suicide among adolescents and young adults. As a matter of public respect and policy, most newspapers do not publish accounts of suicides as such, especially as to teenagers. However, the national notoriety given to the lawsuits involving the subliminal feature of "Suicide Solution" as well as the songs of Judas Priest have produced many reports of suicides or attempted suicides connected to Osbourne's music in general and in particular the song "Suicide Solution". Sadly, Osbourne's music has been linked to at least fifteen reported teen suicides including Petitioners' sons Waller and Hamilton. Evidence in the case reveals the troubling fact that some of these victims felt that "Ol Oz has all the answers".

It has, of course, been widely held that the First Amendment to the United States Constitution does not preclude a civil action for damages simply because a tort was committed through the vehicle of speech. *Brandenburg v. Ohio*, 395 U.S. 444, *Olivia N. v. NBC, Inc.*, 144 Cal. Rptr. 511 (74 Cal. App. 3rd 383) (1977); *Walt Disney Productions, Inc. v. Shannon*, 247 Ga. 402, 276 S.E. 2d 580 (1981).

The Supreme Court of Georgia has cited *Olivia N.*, supra, as authority for the proposition that a tort Defendant can be held liable if the Defendant incited, within the meaning of *Brandenburg*, a third party to commit a crime against the Plaintiff. The facts in the *Olivia N.* case are significant. There, the California Court of Appeals

held that where Defendants, including the mass media, have incited violent or depraved action tort, liability can be imposed without violating the First Amendment. In *Olivia N.*, a young girl brought an action against two broadcasting companies for injuries she suffered when she was artificially raped with a bottle by teenagers who had seen a rape scene in a television program broadcast by the Defendants. The trial court reviewed the film and made the finding that it did not *advocate* or *encourage* violent or depraved acts. The trial court dismissed the case but the Court of Appeals reversed, holding that Plaintiff was entitled to present to a jury the evidence which she contended would show that the Defendants' broadcast of the film resulted in injuries to her.

In the instant case, Plaintiffs in both cases clearly allege and contend that Defendants incited their sons to suicide and a jury should be permitted to determine the issues in the case, including a determination as to whether or not Defendants have lost their First Amendment protection by the incitement contended for by Plaintiffs.

Of particular significance and support in this matter is the case of *Weirum v. RKO General, Inc.*, 1975, 15 Cal. 3d 40. Weirum has also been cited as authority by the Supreme Court of Georgia in *Walt Disney Productions, Inc. vs. Shannon, supra*. *Weirum* properly provides an example of where the limits lie in First Amendment protection and that such freedom of expression is not unlimited. Among other things, *Weirum* holds that the First Amendment does not sanction the infliction of physical injury merely because achieved by word rather than act.

In *Weirum,* the California Supreme Court applied traditional negligence concepts and held that it was reasonably foreseeable that listeners would react to the promotion by driving negligently, and that the broadcaster was liable for creating a situation in which a driver would be likely to speed and thereby to cause injury to another. The court in *Weirum* analyzed the entire concept of risk in a negligence situation and determined that the *gravity and likelihood of danger created by the broadcast outweighed the utility of the broadcast;* that the social utility of the broadcast was its entertainment value in the promotion of commercial rewards. Such a broadcast could not justify such a grave risk. Therefore, it was for the creation of an unreasonable risk of harm by the use of speech that the radio station was held civilly accountable in *Weirum.*

While the appellate courts in Georgia have not directly ruled upon a factual situation similar to the present case, the bent of the Supreme Court of Georgia is clearly shown by the opinion in the case of *Walt Disney Productions, Inc. vs. Shannon, supra,* wherein the Supreme Court of Georgia made the following important statement:

> "We can nonetheless envision situations in which an adult could be held liable in tort solely on the ground that statements uttered by him constituted an invitation to a child to do something causing the child injury. However, under First Amendment jurisprudence, the adult should not be subjected to liability under such a theory unless what the adult invited the child to do presented a clear and present danger that injury would in fact result." (Page 405 of decision)

The outcome in the *Walt Disney* case would very likely have been different had there been fifteen or more injuries as is the case with suicide related to heavy metal music.

Closely akin to the instant case are those cases which have imposed liability upon Defendants for their negligent conduct where the conduct caused insanity or an irresistible impulse which led the victim to commit suicide. These cases are at least found in the states of Missouri, New York, New Jersey, and Massachusetts, e.g. *Wallace vs. Bounds*, 369 S.W. 2d 138 (Mo. 1963); *Garmon vs. General American Life Insurance Company*, 624 S.W. 2d 42 (Mo. 1981); *Fuller vs. Preis*, 322 N.E. 2d 263 (N.Y. 1974); *Zygmaniak vs. Kawasaki Motors Corp.*, 131 N.J. Super. 403, 330 A 2d 56 (1974); *Freyermuth vs. Lutfy*, 376 Mass. 612, 382 N E. 2d 1059 (1978).

While suicide per se is not statutorily prohibited as a crime in Georgia, there is no question but that suicide by *minors* or the promotion thereof is absolutely contrary to public policy in Georgia as well as all other states. In this country there are approximately six thousand teenage suicides each year with another six hundred thousand attempts annually. This is a terrible and useless drain of young minds and lives which our society can in no way countenance. Furthermore, there is absolutely no redeeming social value or artistic content to be recognized in Osbourne's music insofar as suicide is concerned.

Defendants will, of course, try to rely on the very similar facts and circumstances in the case of *McCollum, et al. vs. CBS Records, Inc.*, 249 Cal. Rptr. 187 (1988), but that case did not rule on the question of the existence of

subliminal messages, and, also, young McCollum was an adult at the time of his suicide.

B. IN ADDITION TO THE FIRST AMENDMENT ISSUE AN IMPORTANT ISSUE IS PRESENTED AS TO WHETHER THE DISTRICT COURT AND THE ELEVENTH CIRCUIT COURT OF APPEALS MISAPPLIED THE RULE CONCERNING THE BURDEN PLACED ON NONMOVANTS AS FOUND IN THE *ADICKES* RULE AS WELL AS THE MISAPPLICATION OF THE DISTRICT COURT OF THE *CELOTEX* RULE IN SUCH CASES.

The bulk and gist of the District Court's May 6, 1991 decision, which was affirmed by the Court of Appeals in this case, dealt with the Court's discussion of whether a subliminal message appeared on the "Blizzard of Oz" cassette tape track. Defendants presented no evidence in support of their motion for summary judgment denying the existence of such subliminal, whereas Plaintiffs did present expert evidence that the messages were present and were below the threshold of conscious preception.

It is to be noted that a State Court in Nevada has held in a similar case that subliminal messages are not entitled to First Amendment protection. *Vance vs. Judas Priest*, Number 86-5-844/86-3939 (2d Judicial District Court of the State of Nevada, August 24, 1990)

The first issue in the Waller case to be decided by the Court was whether or not there was a subliminal message on the cassette tape that young Waller had listened to. Defendants never presented any experts or other evidence in the case whatsoever at any time to establish that

there was *not* a subliminal message on the cassette tape. The affidavits of Max Norman and Ozzy Osbourne, which were submitted with Defendants' motion for summary judgment simply talked about how the recording was made and in the case of Osbourne's affidavit what his *intentions* were.

Under these circumstances, Defendants could not even meet the test required by the *Celotex* case, let alone the rule established in *Adickes*. In *Celotex*, the Supreme Court said:

> "Of course, a party seeking summary judgment always bears the initial responsibility of informing the District Court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact".

Under the cases cited, the fact remains that in this case the District Court clearly erred in finding that there was no evidence anywhere in the record of the existence of a subliminal. Defendants never presented any evidence by anyone that using either the method described by Plaintiffs' experts Martin Hall or described in the computer method used by Plaintiffs' expert Victoria Evans that the words in issue, i.e., "Get the gun and try it, shoot, shoot, shoot", were not present or heard under the circumstances.

The evidence as to Plaintiffs' witness Martin Hall is found in his deposition as follows:

Page 84. "I agreed and stated that they were preconscious at a preconscious level (Witnesses referring to case study of Ozzy Osbourne's "Suicide Solution" as published in 1986 Newsletter (Exhibit 21 to Martin Hall's deposition.) In the newsletter published by Martin's firm, it is stated that "While both subliminal suggestion and preconscious condition share the same goal as sending messages past the conscious, analytical mind. . . . ")

Page 85. "I did not say the words are audible. And again, that is the real turning point here".

Page 85. "Insofar as 'Suicide Solution' is concerned, this article is correct insofar as the designation of this kind of a performance as being preconscious because clearly there is something there. What it is, is unclear".

Page 103. "You found preconscious suggestions in 1986? Correct. Yes".

Page 135. "When I said get past or get messages past the conscious, what it means is the use of various means to try to bypass the process by which we evaluate the merit of what we hear".

Clearly, this is clear evidence of the existence of a subliminal message on the cassette song "Suicide Solution". This evidence would even have been sufficient to deny the motion for summary judgment had Defendants presented an affidavit denying the existence of a subliminal message or preconscious suggestion, since this would have been nothing more than a credibility contest between Plaintiffs' expert witnesses and Defendants' witnesses on a relevant issue. *Webster vs. Offshore Food Service, Inc.*, 434 F. 2d 1191 (5th Cir. 1970).

The District Court's opinion and adopted by the panel in this case is no more than a situation where the District Court simply failed to follow the rule in *Clark vs. Coats and Clark, supra,* and the opinion should be reversed.

Especially noteworthy in all this is the fact that the Bureau of Alcohol, Tobacco and Firearms has adopted a definition of subliminals that fits the instant case like a glove. That definition is as follows:

> "(a) Deceptive advertising techniques. Subliminal or similar techniques are prohibited. Subliminal or similar techniques as used in this part refers to any device or technique that is used to convey or attempts to convey a message to a person by means of images of sounds of a very brief nature that cannot be perceived at a normal level of awareness". (27 C.F.R. Section 5.6(h) 1988)

There is absolutely no evidence whatsoever in the record of this case that the words "Get the gun and try it, shoot, shoot, shoot" can be perceived at a normal level of awareness. Plaintiffs' witnesses Phillip Alt and Norman I. Perle both signed affidavits stating their inability to hear the words in question.

This is especially significant in view of the statement in Appellees' brief that Defendant CBS made a deliberate effort to *mask* certain British obcenties in the mixing of the song.

Also of interest and of significance is the fact that the song "Suicide Solution" has been copyrighted at least twice by Defendants and the first copyright dated 1980 shows no words during the interlude in question,

although the 1986 copyright does set forth the words contended for by Defendant Osbourne in the interlude. Therefore, at the time of the death of young Waller there was no copyright of record showing the existence of any words on the interlude.

In effect the trial court applied the rule in *Celotex Corporation vs. Catrett*, 477 U.S. 317 (1986), instead of applying the proper rule as found in *Adickes vs. S. H. Kress and Company*, 398 U.S. 144 (1970). This issue is, of course, applicable only in petitioner Waller's case. It is submitted that upon grant of certiorari it will be readily shown to this Court that clear error was committed by the District Court's decision, which was affirmed by the Eleventh Circuit Court of Appeals.

CONCLUSION

For the reasons above set forth, Petitioners strongly urge this Honorable Court to grant certiorari in this case in order that a significant interpretation of the First Amendment may be had as applied to the facts of these cases.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY/AMERICUS DIVISION

THOMAS G. WALLER and MYRA L WALLER, individually; and THOMAS G. WALLER, as the administrator of the estate of MICHAEL JEFFERY WALLER, deceased, Plaintiffs, vs. OZZY OSBOURNE; CBS INCORPORATED; CBS RECORDS; JET RECORDS; BOB DAISLEY; RANDY RHOADS; ESSEX MUSIC INTERNATIONAL, LTD.; ESSEX MUSIC INTERNATIONAL, INCORPORATED, Defendants.	CIV. NO. 88-111-ALB/AMER (DF) (Filed May 6, 1991)

FITZPATRICK, District Judge

Plaintiffs Thomas and Myra Waller allege in the above captioned action allege that the defendants proximately caused the wrongful death of their son Michael Jeffery Waller by inciting him to commit suicide through the music, lyrics, and subliminal messages contained in the song "Suicide Solution" on the album "Blizzard of Oz." Defendants deny all allegations of wrongdoing on

their part and now have pending before the court a joint motion for summary judgment.

I. BACKGROUND FACTS

Plaintiffs filed their original complaint in this case on April 28, 1988, following the death of their son Michael Jeffery Waller on May 3, 1986, as the result of a self-inflicted pistol wound to his head.[1] In that original complaint, plaintiffs alleged that their son's suicide occurred after he had repeatedly listened to an Ozzy Osbourne cassette tape which contained audible and perceptible lyrics that directed Michael Waller to take his own life.[2] Plaintiffs' Complaint, ¶¶ 24, 27.

Defendants Ozzy Osbourne, CBS Inc., and CBS RECORDS Inc., responded to the plaintiff's complaint by moving the court to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) because it failed

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[1] The pleadings in this case contain very little information about Jeffery Michael Waller and the events surrounding his death other than plaintiffs' description of him as a "troubled adolescent." Brief by Plaintiffs in Opposition to Defendants Motion to Dismiss Plaintiffs' Complaint, p.2.

[2] The alleged lyrics that were audible and perceptible during a twenty-eight second interlude in the song "Suicide Solution" on the album titled "Blizzard of Oz" and went as follows:

> Ah know people You really know where it's at You got it Why try, why try Get the gun and try it Shoot, shoot, shoot.

Plaintiffs' Complaint, § 22.

to state a claim upon which relief could be granted. Before the court acted on the motion to dismiss, however, plaintiffs filed a motion to amend their complaint which the court authorized.

The modified complaint, (Plaintiffs' Amended Complaint), discarded the claim that the lyrics which allegedly incited their son to commit suicide were audible and perceptible and instead charged that those same lyrics represent a subliminal message that is consciously intelligible only when the music is electronically adjusted. Plaintiffs' Amended Complaint, ¶ 27. The amended complaint further alleges that as a result of the dissemination of the music, lyrics, and subliminal message in the song "Suicide Solution" on the album "Blizzard of Oz," defendants are liable to the plaintiffs for causing the pain and suffering of their deceased son; inciting him wrongful death; encouraging persons to physically harm themselves or commit suicide; and engaging in fraud, invasion of privacy, and nuisance. Plaintiffs' Amended Complaint, ¶¶ 40-54.

Defendants responded to plaintiffs' amended complaint by filing a joint motion to dismiss plaintiffs' complaint as amended. In addressing defendants' motion to dismiss in an order dated July 20, 1989, the court distilled plaintiffs' complaint down to the dispositive issue of whether or not the alleged subliminal message actually existed and, if so, were the defendants nevertheless protected from liability by the first amendment to the United States Constitution. The court granted plaintiffs the opportunity to pursue that issue through discovery and therefore denied defendants' motion to dismiss with the proviso that upon the completion of discovery the motion

could be renewed in the form of a summary judgment motion.[3]

As the discovery phase of the case began, plaintiffs were confident that a subliminal message existed within a twenty-eight second interlude on the son "Suicide Solution."[4] Plaintiffs asserted, however, that the existence of the subliminal message could "only be confirmed by having an opportunity to test the multi-track masters and stereo masters of the entire tape of the album "Blizzard of Oz."[5] Plaintiffs' Response to Defendant CBS Records Inc's

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[3] In the July 20, 1989 order, the court also denied Defendants' original Motions to Dismiss, Plaintiffs' Motion to Disallow Defendants' Joint Motion to Strike, and Defendants' Joint Motion to Strike.

[4] At a status conference held on February 21, 1990, plaintiffs' attorney informed the court of the following regarding the presence of a subliminal message in the song "Suicide Solution:"

> We don't want for a minute to take the position that we are in this case looking for a subliminal message. We contend we have one. It is in the 28-second interlude, . . .

Transcript of February 21, 1990, status conference, pp. 14-15.

[5] Plaintiffs' contention that an analysis of the master tapes represented the only means of confirming the existence of a subliminal message was reiterated in a March 23, 1990 correspondence to the court in which plaintiffs' attorney states that "only by an examination of the masters can it be determined with certainty whether a subliminal exists anywhere on the entire tape. . . . " Brief in Support of Defendants' Joint Motion for Summary Judgment, exh. 7, p.3.

Second Interrogatories. Plaintiffs therefore requested that they be given the opportunity to have their expert examine the master tapes of the "Blizzard of Oz" album. Defendants consented to plaintiffs' request and on August 27, 1990, delivered the twenty-four track and stereo master tapes of the "Blizzard of Oz" album to the studio of the expert plaintiffs had hired to analyze the tapes.

The expert plaintiffs employed to examine the master tapes, Martin Hall, is a Santa Barbara High School graduate who has completed upper level history courses at the University of California at Santa Barbara. Hall Dep., p.13. Mr. Hall is not an expert in mastering and mixing rock music, however, he had previously tested the commercial release of "Suicide Solution" for the plaintiffs in the case of *McCollum v. CBS, Inc.*, 202 Cal. App. 3d 989, 249 Cal. Rptr. 187 (1988). Hall Dep., p.65. That examination of "Suicide Solution" by Mr. Hall led him to conclude that the song did not contain subliminal messages but rather something he identified as "preconscious suggestions." Hall Dep. exh. 21, p.2. This is a term he uses to describe something which is not the same as a subliminal message since, according to Hall, a subliminal message is not audible while a preconscious suggestion can be heard though not necessarily understood. Hall Dep. exh. 18, p.2.

The preconscious suggestions Mr. Hall found were a series of lyrics which are "clearly audible but mostly unintelligible."[6] *Id.* Mr. Hall noted at that time, however,

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[6] The lyrics contained in the "clearly audible but mostly unintelligible" preconscious suggestion Mr. Hall identified in

(Continued on following page)

that his version of the alleged preconscious lyrics did involve "guess work" which could only be confirmed by examining the master tape of "Suicide Solution." Hall Dep. exh. 17.

In his role as an expert witness for the plaintiffs in this case, Mr. Hall was given the opportunity to confirm his guess work by inspecting master tapes of the album "Blizzard of Oz" which contains the song "Suicide Solution." After conducting tests on the master tapes, Mr. Hall did not find any subliminal messages in the song "Suicide Solution." In his report prepared for plaintiffs' attorney, Mr. Hall stated that the alleged subliminal lyrics are actually lyrics that are "preconscius, in that the vocal performance [of the lyrics in question] is audible (and is, therefore, not subliminal per se) but not immediately intelligible." Hall Dep. exh. 18, p.2. The method of testing that plaintiffs in this case had assured the court on numerous occasions was the only means of confirming the existence of a subliminal message in the song "Suicide Solution" determined with certainty that no subliminal messages existed anywhere on the entire tape.

Plaintiffs' other expert, Victoria Evans, a computer science lecturer who has no experience in music recoding or sound engineering, attempted to identify subliminal messages in the song "Suicide Solution" through the use

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(Continued from previous page)

his 1986 testing of "Suicide Solution" turn out to be precisely the same lyrics that plaintiffs in the instant case found to be audible and perceptible in their initial complaint and then to be a subliminal message according to their amended complaint. *See* footnote 1 of this order for the text of those lyrics.

of a MacIntosh computer and a software package called DigiDesign AudioMedia. Evans Dep., pp.20, 47-49. While Ms. Evans credits the computer system with enabling her to discover what she has labelled a subliminal message in the song "Suicide Solution," the MacIntosh computer and the AudioMedia program did not, and could not, identify any of the words in the song; nor could it indicate any distinction between the lyrics and music contained on the record album. Evans Dep., pp. 51-52. The computer system assisted Ms. Evans by allowing her to copy the music onto a "sound file" and then slow it down so she could carefully listen to the lyrics. The only manner, however, in which Ms. Evans actually identified what she has labeled a subliminal message in the song "Suicide Solution" was by literally hearing the words with her own ears. Evans Dep., p. 52. Those words Ms. Evans heard on "Suicide Solution," which she labelled as a subliminal message, are an almost identical listing of the words that plaintiffs initially identified as, and Mr. Hall currently claims are, audible lyrics.[7] Evans Dep. exh.5.

Ms. Evans' findings indicate that she also has determined that the lyrics, which plaintiffs assert represent a

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[7] The alleged subliminal message that Ms. Evans claims she heard is as follows:

> Alright now, people . . . (people is echoed) you really know what it's about, you've got it.
>
> Why try, why try . . . Take the gun, 'n try it, try it . . .
>
> Shoot! shoot! shoot! shoot! Shooo.., sshooo, sshooo, sshoooooo, (. . . Laughter . . .) Sshoo, sshoo, sshooo . . . (sshooo sound repeats) go'awn.

Evans Dep. exh. 5.

subliminal message that incited their son to commit suicide, are words that are audible though not immediately intelligible. Evans Dep., p. 55. However, unlike plaintiffs' other expert, Mr. Hall, who failed to find a subliminal message because he realized that if the words are audible they cannot be subliminal, Ms. Evans found what she had labelled a subliminal message for the plaintiffs by failing to recognize the true meaning of subliminal and instead defining it for her purposes as any words contained in music that are barely heard but not decipherable. Evans Dep., 59.

Other than the expert witnesses Hall and Evans, plaintiffs produced two other affidavits in support of their case. The affidavits, however, fail to add any additional information not already provided by plaintiffs' other experts and merely indicate that they found lyrics in the song "Suicide Solution" unintelligible. Soon after those affidavits were taken, discovery in the case was closed and defendants filed the instant joint motion for summary judgment now before the court.

II. DISCUSSION

Rule 56(c) of the Federal Rules of Civil Procedure allows for the granting of Summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Upon motion and after adequate time for discovery, Rule 56(c) mandates the entry of summary judgment "against a party who

fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). A movant may discharge his burden by showing "that there is an absence of evidence to support the nonmoving party's case." *Id.* at 326, 106 S.Ct. at 2554.

In evaluating a summary judgment motion, the evidence and all factual inferences must be viewed in the light most favorable to the nonmovant. *Thrasher v. State Farm Fire & Casualty Co.*, 734 F.2d 637, 638 (11th Cir. 1984). "If a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, then the court should not grant the summary judgment motion." *Samples on Behalf of Samples v. City of Atlanta*, 846 F.2d a1328, 1330 (11th Cir. 1988).

In determining whether or not the court should grant the joint summary judgment motion of the defendants in this case, the court must initially resolve the issue of whether, as a matter of law, the song "Suicide Solution" on the album "Blizzard of Oz" contains subliminal messages as alleged by plaintiffs. The court finds this step necessary because it is convinced that the presence of a subliminal message, whose surreptitious nature makes it more akin to false and misleading commercial speech and other forms of speech extremely limited in their social value, would relegate the music containing such to a class

worthy of little, if any, first amendment constitutional protection.[8]

Plaintiffs attempt to establish the presence of subliminal messages in the song "Suicide Solution" contained on the "Blizzard of Oz" album primarily through the deposition testimony of two expert witnesses. Plaintiffs' expert, Mr. Hall, however, fails to create an issue of fact concerning the existence of a subliminal message when his specific finding is that since the lyrics in question in this case are audible, they cannot be a subliminal message as plaintiffs allege. Hall Dep. exh. 18, p.2.

Plaintiffs' other expert, Ms. Evans, is equally unsuccessful in creating a genuine issue of fact since she contends that the lyrics in question are a subliminal message precisely because they are barely heard but not decipherable. Evans Dep., 59. While the court was unable to find a precise legal definition of a subliminal message, it is clear from the definition of subliminal that lyrics which are audible enough to make one consciously aware of their presence, though they may not necessarily be intelligible, do not qualify as a subliminal message.

According to *Webster's Ninth New Collegiate Dictionary*, (1985 Edition), subliminal is actually defined as "inadequate to produce a sensation or perception" and "existing on functioning below the threshold of conscious awareness." *Random House Dictionary* (1987 Edition) defines subliminal as "existing or operating below the

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[8] *See Vance v. Judas Priest*, No. 86-5844/86-3939 (2d Judicial District Court of the State of Nevada, Aug. 24, 1990), for an in depth discussion of subliminal messages.

threshold of consciousness; being or employing stimuli insufficiently intense to produce a discrete sensation but often being or designed to be intense enough to influence the mental processes or the behavior of the individual." If, as defined, a subliminal message must exist below the threshold of conscious awareness then it must follow that lyrics distinct enough to be heard and reacted to – even though garbled or unclear, are not a subliminal message. The most important character of a subliminal message is that it sneaks into the brain while the listener is completely unaware that he has heard anything at all.[9] If the message is heard to any extent, even if garbled and unintelligible, the listener consciously attempts to discern a meaning from that which he hears. One is then dealing, not with a subliminal message, but rather the interpretation of an abstract medium which is akin to spotting objects in cloud formations.

Possibly a visual subliminal message such as the words "eat popcorn" on a reel of movie film can be proved more easily than an audio one such as the one alleged here. If the film is stopped and one holds each frame up to the light somewhere there must be at least one frame that says "eat popcorn." Here, there is nothing that says what the plaintiffs contend unless one uses his

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[9] In the book *Subliminal Seduction*, submitted by the plaintiffs, the author notes: Anything consciously perceived can be evaluated, criticized, discussed, argued, and possibly rejected, whereas unconsciously perceived information meets no resistance or qualification by the intellect. Subliminal data are merely stored in the brain with identifications . . . which will trigger a delayed, alarm-clock reaction capable of motivating behavior. W. Key, *Subliminal Seduction*, p.135 (1973).

imagination. Therefore, despite her desire to label the lyrics contained in the twenty eight second interlude on the song "Suicide Solution" a subliminal message, the fact that Ms. Evans found that those lyrics are audible means that she has proved just the opposite – that the lyrics are not a subliminal message.

Furthermore, honoring Ms. Evans definition of subliminal message would mean that all rock music, or any music for that matter, which contains unintelligible lyrics could be found to contain a subliminal message, thereby, subjecting an endless number of performers and producers to possible law suits. It would be an understatement to say such a ruling would open the flood gates of litigation.

Ms. Evans' expert opinion that the song "Suicide Solution" contains a subliminal message directly contradicts the opinion rendered by plaintiffs' other expert, Mr. Hall. Moreover, in light of the definition of subliminal and the manner in which she defines subliminal message, if is clear that her opinion lacks any credible support and as such fails to create a genuine issue of fact concerning whether the song "Suicide Solution" on the album "Blizzard of Oz" contains subliminal messages. *See American Key Corp. v. Cole National Corp.*, 762 F.2d 1569, 1580 (11th Cir. 1985) ("An expert's opinion that lacks any credible support does not create an issue of fact.").

Plaintiffs have steadfastly predicted that given the opportunity to thoroughly examine the song "Suicide Solution" they would be able to prove the existence of a subliminal message in the song. After their experts were

given an unrestricted opportunity to find a subliminal message in the music in question, however, plaintiffs have been unable to produce any evidence which creates a genuine issue of fact concerning whether the song "Suicide Solution" on the album "Blizzard of Oz" contains a subliminal message. Plaintiffs have simply failed to produce any evidence from which one could even infer that there is a subliminal message in the song "Suicide Solution" on the album "Blizzard of Oz."

The court noted in its order denying defendants' motion to dismiss that the plaintiffs would be hard-pressed to avoid summary judgment in this action absent the presence of a subliminal message in the music of the defendants. Such is the case because music[10] in the form of entertainment represents a type of speech that is generally afforded first amendment constitutional protection. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65, 101 S.Ct. 2176, 2181, 68 L.Ed.2d 671 (1981). A constitutional protection that shields all who write, perform, or disseminate the music irrespective of whether it constitutes aberrant, unpopular, and even revolutionary music. *See High Ol' Times, Inc. v. Busbee*, 456 F.Supp. 1035, 1041 (N.D. Ga. 1978) (citing *NAACP v. Button*, 371 U.S. 415, 444-45 (1963); *Terminiello v. Chicago*, 337 U.S. 1 4 (1949)).

The first amendment protection that shields those who produce, perform, and distribute music is not however absolute. *See Konigsberg v. State Bar of California*, 366 U.S. 36, 49, 81 S.Ct. 997, 1005, 6 L.Ed.2d 105, *Reh. denied*,

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[10] The term "music" refers to musical notes, rhythms, tones, and lyrics.

368 U.S. 869, 82 S.Ct. 21, 7 L.Ed.2d 69 (1961). Music legally classified as obscene[11] or defamatory[12], or that which represents fighting words[13] or incites imminent lawless activity[14] is either entitled to diminished first amendment constitutional protection or none at all. Therefore, even though the court has found that defendants' music does not contain subliminal messages, plaintiffs can strip away the first amendment protection defendants now stand behind if they can demonstrate that defendants music fits into one of the above categories.

Plaintiffs contend that the song "Suicide Solution" on the album "Blizzard of Oz" is properly categorized as speech which incites imminent lawless activity thereby depriving defendants of any legitimate claim to first amendment protection. The removal of first amendment protection from defendants' music on such a basis is contingent on a finding that it was "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg*, 395 U.S. at 447, 89 S.Ct. at 1829. Subsequent Supreme Court decisions have

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[11] *See Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957).

[12] *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984).

[13] *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942).

[14] *See Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969).

further indicated that in making such a finding the primary focus of the court should be on the imminence of the threat. *Hess v. Indiana*, 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973).

In *Hess*, the Court was forced to decide whether an antiwar demonstrator's first amendment rights were violated when the state of Indiana arrested him for shouting, "We'll take the fucking street later [or again]," to a crowd the police were attempting to disperse. In upholding the demonstrator's first amendment right to make that statement the court concluded that:

> Since the uncontroverted evidence showed that Hess' statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action. And since there was no evidence or rational inference from the import of the language, that his words were intended to produce, and likely to produce, *imminent* disorder, those words could not be punished by the state on the ground that they had 'a tendency to lead to violence.'

Id. at 108-09, 94 S.Ct. at 328 (citations omitted; emphasis in original).

A careful examination of the defendants' music in accordance with the test developed in *Brandenburg* and refined in *Hess* leads this court to conclude that the defendants did not engage in culpable incitement. There is no indication whatsoever that defendants' music was directed toward any particular person or group of persons. Moreover, there is no evidence that defendants' music was intended to produce acts of suicide, and likely

to cause *imminent* acts of suicide;[15] nor could one rationally infer such a meaning from the lyrics.

Viewing the facts in a light most favorable to the plaintiffs, the song "Suicide Solution" can be perceived as asserting in a philosophical sense that suicide may be a viable option one should consider in certain circumstances. And a strong argument can certainly be made that in light of the almost epidemic proportion of teenage suicides now occurring in this country it is irresponsible and callous for a musician with a large teenage following such as Ozzy Osbourne to portray suicide in any manner other than a tragic occurrence. Nevertheless, an abstract discussion of the moral propriety or even moral necessity for a resort to suicide, is not the same as indicating to someone that he should commit suicide and encouraging him to take such action. *See Noto v. United States*, 367 U.S. 290, 297-98, 81 S.Ct. 1517, 1521, 6 L.Ed.2d 836 (1961). That, however, is what the law requires the plaintiffs to demonstrate in order to hold the defendants liable for inciting their son to commit suicide through the dissemination of their music. *See Brandenburg*, 395 U.S. at 448, 89 S.Ct. at 1830. Plaintiffs have made no such showing and have failed to demonstrate any manner in which defendants' music can be categorized as speech which incites imminent lawless activity. Accordingly, the court finds as a matter of law that defendants are protected by the first amendment from liability for culpable incitement.

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[15] There, in fact, is no evidence nor even any allegations in this case that Michael Jeffery Waller committed suicide immediately after listening to defendants' music.

Absent the allegation that defendants' music represents speech that incites imminent lawless activities, plaintiffs have no other plausible basis in this case upon which they can overcome the broad first amendment protection generally afforded speech in the form of music. Plaintiffs put forth other theories of liability such as negligence, nuisance, fraud, and invasion of privacy. However, all of those tort based theories, as asserted by plaintiffs, fail to overcome the defendants' imposition of a valid first amendment defense.

Numerous courts have pointed out that any attempt to impose tort liability on persons engaged in the dissemination of protected speech involves too great a risk of seriously chilling all free speech. In *Walt Disney Productions, Inc. v. Shannon*, 247 Ga. 402, 276 S.E.2d 580 (1981), the court found that the imposition of tort liability on defendants who were charged with broadcasting statements which invited children to engage in conduct that posed a foreseeable risk of injury would open a Pandora's box and chill the flow of protected speech. The Fifth Circuit Court of Appeals indicated in *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1024 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988), that placing tort liability on some forms of protected speech would require the hopelessly complicated endeavor of differentiating between different categories of protected speech raising the possibility that "the worthiness of speech might be judged by majoritarian notions of political and social propriety and morality."

In the case of *Zamora v. Columbia Broadcasting System*, 480 F.Supp. 199 (S.D. Fla. 1979), plaintiffs urged the court

to impose tort liability on the defendants for their negligent broadcast of violent shows which allegedly caused a susceptible minor to engage in unlawful conduct. In noting that the broadcasts represented speech which did not incite nor in any other way qualify for less than full constitutional protection, the court determined that plaintiffs were in essence asking the court to fashion a new cause of action for the dissemination of protected speech which caused "an untoward reaction on the part of any 'susceptible' person." *Id.* at 206. The court in *Zamora* declined to take such a step asserting that it would be an unconstitutional imposition of a generally undefined and undefinable duty. *Id.*

Plaintiffs do cite the case of *Weirum v. RKO General, Inc.*, 15 Cal. 3d 40, 123 Cal. Rptr. 468, 539 P.2d 36 (1975), in which a wrongful death action was brought against a radio station for broadcasting promotional announcements encouraging listeners to race to a certain site, as supporting its argument that tort liability can and should be imposed in this action. The *Weirum* decision is distinguishable from the instant case, however, because the California Supreme Court never made a finding in the case that it was dealing with protected speech entitled to full first amendment protection.

In the final analysis, the court simply has no basis upon which to impose tort liability on the defendants when, as in this case, the alleged wrongful acts are based on the defendants' dissemination of protected speech. The court, therefore, finds as a matter of law that the defendants' first amendment rights protect them from being held liable under plaintiffs' claims of negligence, nuisance, fraud, and invasion of privacy.

III. CONCLUSION

In all candor the court must also observe that the lyrics of a great many songs that come under the heading of rock music seem to foster an outlook on life that emphasizes alienation, cynicism, rebellion, and futility.[16] In a world full of traps for the unwary teenage such as rampant drug and alcohol abuse and a "new morality" that stresses the importance of doing anything that feels good, an addiction to music of this sort could be another step in a path to self destruction. Nevertheless, whether the defendants' album "Blizzard of Oz" could fit this description, or whether the court approves of rock music in general or of this particular brand of it, is irrelevant. The sole duty of this court in this lawsuit is to determine whether subliminal messages appear in the song and whether the music in question is afforded first amendment protection.

Plaintiffs' case is predicated almost entirely upon the allegation that defendants incited their son to commit suicide by the use of a subliminal message in the song "Suicide Solution" on the album "Blizzard of Oz." They asserted with confidence that a subliminal message did exist and if given the opportunity to test the master tapes of the song they could identify it. However, after being

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[16] On the other hand one man's meat is another man's poison (or woman's as the case may be). Many young people find just as much relaxation and pleasure from rock music without the dreary lyrics of Suicide Solution as the rest of us get from the music of Beethovan, Gamble Rogers, Whitney Houston, or Hank Williams – as the case may be.

given every opportunity to find the subliminal message, using tests they stated were the only ways to confirm its existence, plaintiffs failed to present any evidence from which a reasonable fact finder could even infer that a subliminal message existed within the song "Suicide Solution" on the album "Blizzard of Oz."

Plaintiffs failed to demonstrate the existence of a subliminal message or that defendants' music incites imminent lawless activity, and were thereby left with the difficult task of attempting to impose liability on the defendants based on their dissemination of speech fully protected by the first amendment. It was a task plaintiffs were unable to accomplish.

Having ruled on the matter before the court, this order cannot be signed without an expression of sympathy for the parents of Michael Jeffrey Waller who have shown their devotion to his memory by the filing and prosecution of this lawsuit. The court has no doubt as to the sincerity of their motives in following through with what must be an extremely painful course of action. The death of anyone before he has had a full measure of life is tragic and especially so if the person is a much loved teenaged son. If the death is by suicide the pain and grief to those left behind is almost unbearable. Although the court must render all its decisions without regard to sympathy, that does not mean it loses its capacity to experience that emotion.

Accordingly, for the foregoing reasons, defendants' Joint Motion for Summary Judgment is GRANTED as the court finds that there are no genuine issues of material fact concerning the claims put forth by plaintiffs in this

action and defendants are entitled to judgment as a matter of law.

SO ORDERED, this 6 day of May, 1991.

/s/ Duross Fitzpatrick
DUROSS FITZPATRICK,
JUDGE
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY/AMERICUS DIVISION

MATTIE K. HAMILTON, Plaintiff, vs. OZZY OSBOURNE AND CBS RECORDS INC., A CORPORATION, Defendants.	CIV. NO. 90-35-ALB/AMER(DF) (Filed May 29, 1991)

ORDER

Plaintiff Mattie K. Hamilton has filed the above captioned action against the defendants alleging that their music caused the wrongful death of her son Harold Matthew Hamilton by provoking him to commit suicide. Defendants deny the charges and have moved the court for an entry of summary judgment in their favor because all relief sought by the plaintiff is barred by the first amendment to the Constitution of the United States of America.

In responding to the defendants' motion for summary judgment plaintiff points out that this case involves substantially many of the issues in the parallel and related case of *Waller v. Ozzy Osbourne*, C.A. 88-111-ALB/AMER(DF). The court finds that all the issues raised in the instant action were likewise asserted in *Waller* and addressed by the court in its opinion rendered in that case. The *Waller* decision, which held that the same music at issue in this action is entitled to full first amendment protection which prevents the defendants from being

held liable based on the way certain individuals reacted to it, is therefore adopted and applied as the holding in the case at bar.

In adopting and applying the holding of *Waller* to the instant case, the court wishes to explicitly state that which it implicitly found in the opinion. The first amendment protection the defendants are entitled to under the facts present in *Waller* and the instant action is not diluted by the fact that the affected individuals were minors.

Plaintiff contends that since Harold Matthew Hamilton was a minor, "[t]he instant case offers this Court an opportunity to in effect break new ground by applying time-honored restrictions on what is appropriate for minors and what is not." Plaintiff's Response to Defendants' Joint Motion For Summary Judgment, p.5. However, in arguing that this court should fashion a cause of action out of the facts presented in her case, plaintiff incorrectly interprets both the duty of this court and the applicable law. This court is charged with following the law, not establishing it. Furthermore, the cases cited by the plaintiff as providing a basis for breaking new ground have a totally distinct set of facts which makes their holdings inapplicable to the instant action. It is specifically noted in one of the cases cited by the plaintiff that any restrictions on first amendment rights should apply to as narrow a situation as possible and only be imposed under extraordinary circumstances. *American Booksellers v. Webb*, 919 F.2d 1493, 1500 (11th Cir. 1990). As noted by the court in *Waller*, a thorough analysis of the facts and law reveals that even though the affected individual was a minor there simply is no basis upon which to impose tort

liability on the defendants when, as in this case, the alleged wrongful acts are based on the defendants' dissemination of protected speech.

For the foregoing reasons, the court adopts and incorporates its ruling in *Waller v. Ozzy Osbourne*, C.A. 88-111-ALB/AMER(DF) as the ruling in this case and therefore GRANTS defendants' joint motion for summary judgment.

SO ORDERED, this 28 day of May, 1991.

/s/ Duross Fitzpatrick
DUROSS FITZPATRICK,
JUDGE
UNITED STATES
DISTRICT COURT

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-8507

D. C. Docket No. 88-CV-111-ALB-AMER

THOMAS G. WALLER, Individually and as Administrator of the Estate of Michael Jeffrey Waller, Deceased, MYRA L. WALLER,

Plaintiffs-Appellants,

versus

OZZY OSBOURNE, CBS INCORPORATED, CBS RECORDS, JET RECORDS, BOB DAISLEY, RANDY RHOADS, ESSEX MUSIC INTERNATIONAL, LTD., ESSEX MUSIC INTERNATIONAL, INC.,

Defendants-Appellees.

* * *

No. 91-8510

D.C. Docket No. 90-CV-35-ALB-AMER

MATTIE K. HAMILTON,

Plaintiff-Appellant,

versus

OZZY OSBOURNE, CBS RECORDS, INC., A CORPORATION,

Defendants-Appellees.

Appeals from the United States District Court
For the Middle District of Georgia

(Filed March 12, 1992)

Before HATCHETT and DUBINA, Circuit Judges, and GODBOLD, Senior Circuit Judge.

PER CURIAM:

In these consolidated cases, we affirm the district court based upon its order reported as *Waller v. Osbourne, Et al.*, 736 F. Supp. 1144 (M.D. Ga. 1991), and the attached order.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY/AMERICUS DIVISION

MATTIE K. HAMILTON, Plaintiff, vs. OZZY OSBOURNE AND CBS RECORDS INC., A CORPORATION, Defendants.	:	CIV. NO. 90-35-ALB/ AMER(DF) (Filed May 29, 1991)

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all relief sought by the plaintiff is barred by the first amendment to the Constitution of the United States of America.

In responding to the defendants' motion for summary judgment plaintiff points out that this case involves substantially many of the issues in the parallel and related case of *Waller v. Ozzy Osbourne*, C.A. 88-111-ALB/AMER(DF). The court finds that all the issues raised in the instant action were likewise asserted in *Waller* and addressed by the court in its opinion rendered in that case. The *Waller* decision, which held that the same music at issue in this action is entitled to full first amendment protection which prevents the defendants from being held liable based on the way certain individuals reacted to it, is therefore adopted and applied as the holding in the case at bar.

In adopting and applying the holding of *Waller* to the instant case, the court wishes to explicitly state that which it implicitly found in the opinion. The first amendment protection the defendants are entitled to under the facts present in *Waller* and the instant action is not diluted by the fact that the affected individuals were minors.

Plaintiff contends that since Harold Matthew Hamilton was a minor, "[t]he instant case offers this Court an opportunity to in effect break new ground by applying time-honored restrictions on what is appropriate for minors and what is not." Plaintiff's Response to Defendants' Joint Motion For Summary Judgement, p.5. However, in arguing that this court should fashion a cause of action out of the facts presented in her case, plaintiff

incorrectly interprets both the duty of this court and the applicable law. This court is charged with following the law, not establishing it. Furthermore, the cases cited by the plaintiff as providing a basis for breaking new ground have a totally distinct set of facts which makes their holdings inapplicable to the instant action. It is specifically noted in one of the cases cited by the plaintiff that any restrictions on first amendment rights should apply to as narrow a situation as possible and only be imposed under extraordinary circumstances. *American Booksellers v. Webb*, 919 F.2d 1493, 1500 (11th Cir. 1990). As noted by the court in *Waller*, a thorough analysis of the facts and law reveals that even-though the affected individual was a minor there simply is no basis upon which to impose tort liability on the defendants when, as in this case, the alleged wrongful acts are based on the defendants' dissemination of protected speech.

For the foregoing reasons, the court adopts and incorporates its ruling in *Waller v. Ozzy Osbourne*, C.A. 88-111-ALB/AMER(DF) as the ruling in this case and therefore GRANTS defendants' joint motion for summary judgment.

SO ORDERED, this 28 day of May, 1991.

/s/ Duross Fitzpatrick
DUROSS FITZPATRICK,
JUDGE
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-8507 & 91-8510

THOMAS G. WALLER, Individually and as Administrator of the Estate of Michael Jeffrey Waller, Deceased, MYRA L. WALLER,

Plaintiffs-Appellants,

versus

OZZY OSBOURNE, CBS INCORPORATED, CBS RECORDS, JET RECORDS, BOB DAISLEY, RANDY RHOADS, ESSEX MUSIC INTERNATIONAL, LTD., ESSEX MUSIC INTERNATIONAL, INC.,

Defendants-Appellees.

MATTIE K. HAMILTON,

Plaintiff-Appellant,

versus

OZZY OSBOURNE, CBS RECORDS, INC., A CORPORATION,

Defendants-Appellees.

On Appeal from the United States District Court
For the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Filed May 18, 1992)

Before: HATCHETT and DUBINA, Circuit Judges, and GODBOLD, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
UNITED STATES CIRCUIT JUDGE

ORD-42
(9/91)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-8507

D. C. Docket No. 88-CV-111-ALB-AMER

THOMAS G. WALLER, Individually and as Administrator of the Estate of Michael Jeffrey Waller, Deceased, MYRA L. WALLER,

Plaintiffs-Appellants,

versus

OZZY OSBOURNE, CBS INCORPORATED, CBS RECORDS, JET RECORDS, BOB DAISLEY, RANDY RHOADS, ESSEX MUSIC INTERNATIONAL, LTD., ESSEX MUSIC INTERNATIONAL, INC.,

Defendants-Appellees.

No. 91-8510

D.C. Docket No. 90-CV-35-ALB-AMER

MATTIE K. HAMILTON,

Plaintiff-Appellant,

versus

OZZY OSBOURNE, CBS RECORDS, INC., A CORPORATION,

Defendants-Appellees.

Appeals from the United States District Court
for the Middle District of Georgia

(Filed June 1, 1992)

Before HATCHETT and DUBINA, Circuit Judges, and GODBOLD, Senior Circuit Judge.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the orders of the District Court appealed from in these cauess be and the same are hereby AFFIRMED;

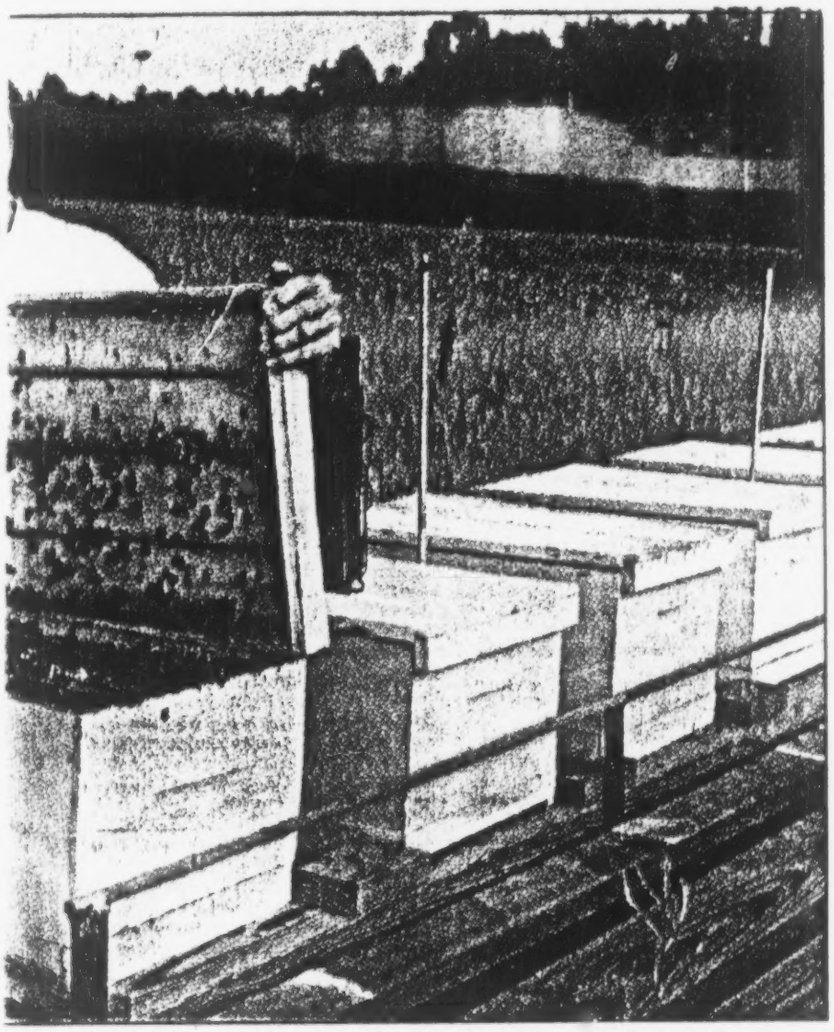
It is further ordered that plaintiffs-appellants pay defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

Entered: March 12, 1992
For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: MAY 27 1992

: buzz on bees



Robert Seay/The Macon Telegraph

‹s on some of his domesticated bees and their hives

t 300 spe-)ela- ‹s of the ›ven)ean

rom ıedi- lows

Pesticides are another peril that bees face. "I guess just about the worst enemy bees have is man," McCurdy said.

Pesticide-using farmers and beekeepers have sometimes been at odds. Wild bees and other insects pollinated crops, while beekeepers concentrated on producing honey.

Honey is still the big cash-producer for Georgia beekeepers, with 102,000 hives yielding about $2.7 million worth of the it last year. But commercial pollination is growing, Delaplane said.

The state hasn't started keeping statistics on the service yet, but has a list of 18 beekeepers with 18,000 hives available to farmers. McCurdy has about 800 hives and others own as many as 4,000.

Please see BEES, 4A ➡

marijuana indoors

:ent drug

ı use, leading to a crawl space
A heavy steel door stood at
t was another door made of
s pushed that door open and
nt at what lay beyond.

:ing into a big dance hall," he

a huge underground green-
foot Quonset hut reinforced
s to support tons of soil piled
the chamber were irrigation hoses, fans, soil pots and enough high-intensity grow lamps to light up a football stadium.

Welcome to the indoor grow, the latest front in the government's war against marijuana.

A crackdown on growers of America's most widely used illegal drug has reduced the size and number of outdoor pot patches in the nation's biggest marijuana-producing areas: Hawaii, the Pacific Northwest, Kentucky and Tennessee. Officials say aerial surveillance, herbicide spraying and commando-style "whack-and-stack" raids have taken their toll.

Please see MARIJUANA, 4A ➡

Rap music draws fire for lyrics

Defenders: Records fill a 'cultural need'

By John Horn
The Associated Press

LOS ANGELES — Time Warner Inc. is taking the rap for recording "Cop Killer" by Ice-T, a song some people argue invites bloodshed. But it's hardly the only record label with rowdiness and raunch in its repertoire.

Sony Music's stable includes the artists Bytches With Problems, No Face, Tim Dog and Public Enemy. Capitol Records distributes Schooly D and Niggas With Attitude — also known as N.W.A.

Walt Disney Co.'s Hollywood Records was so embarrassed by its rapper Hi-C's explicit record "Skanless," the company removed its name from the album before its release this year.

Some rappers pour forth torrents of obscenities, refer to women as whores and bitches, celebrate grisly murders and mayhem or depict sex and sodomy in the lewdest terms.

Should record companies set limits on what they sell young record buyers?

One top executive in the industry thinks so.

"It's not a matter of censorship," said David Geffen, chairman of Geffen Records. "It's a matter of responsibility. You can make money selling cocaine. I choose not to."

Of Ice-T's "Cop Killer" and "KKK Bitch," heavy metal songs recorded on his album "Body Count" and released on Time Warner's Sire label, Geffen said: "I simply would not put out this kind of a record."

Ice-T

Geffen refused in 1990 to distribute a Geto Boys album describing unrelenting brutality and violence, including necrophilia. The group found a new distributor: Time Warner.

But many labels put out records that feature vulgarity. Hi-C's songs include "2 Ada Time" and non-stop expletives. Tim Dog cut the single "Patriotic Pimp." Schooly D relates a conversation with God about masturbation. Public Enemy sang "How to Kill a Radio Consultant."

This is rap music's bark and bite, and ever since this form of inner-city poetry surfaced in the 1970s, the words have grown increasingly salty.

Please see RAP, 4A ➡

BEST AVAILABLE COPY

BEST AVAILABLE COPY

Bees an essential part in production of many crops

Continued from page 1A

For some crops, the hives are essential. One Lumpkin County farmer grew a fine field of pumpkin plants last year, Delaplane said, which were covered in blossoms.

"He didn't have any bees around, and he wound up getting very few pumpkins," the entomologist said.

McCurdy said most flowers need three to eight visits from a bee to be fully pollinated. The more visits, the more fertilized seeds, and the bigger and more succulent the fruit, he said.

With 50,000 to 80,000 worker bees per hive, honeybees far outstrip small-colony insects like bumblebees and yellow jackets when it comes to pollinating flowers.

Lumpkin pumpkins and other vine fruits and vegetables — like cucumbers, squash and melons — need bees the most. Apple trees, too, require insect pollinators, although peaches and most grain crops don't.

Many of those crops that need bees don't produce much of the nectar that bees make into honey. So beekeepers rent out their hives for $20 to $30 apiece, depending on how remote the location and how much honey the beekeeper can expect to get. Each hive can service as many as five crops a year, McCurdy said.

An average bee colony produced 42 pounds of honey worth less than $30 last year, according to the Georgia Department of Agriculture. So as long as a hive makes enough honey to feed itself through the winter, putting it near low-nectar crops makes economic sense for beekeepers.

Gentle domesticated bees, especially those strains originally from Italy, are unlikely to sting if they're not provoked. But beekeepers who now work without gloves or heavy clothes are changing their ways in areas where Africanized bees have migrated north.

The so-called "killer bees" haven't turned out to be as dangerous as TV movies predicted, but beekeepers in the Rio Grande valley area of Texas are learning to live with the large, productive, but touchy insects.

The bees, which crossed over to Brazil from Africa and migrated north, tend to displace gentler bees and require much more sensitive handling. "I couldn't put them on the edge of a field like this," McCurdy said at the Dooly County farm. "I'd have to have them plumb out of sight."

Delaplane said the bees seem to be interbreeding with European bees as they move north, producing a hybrid that is still mean, but not as mean as the South American bees.

Efforts to stop the bees from spreading have failed, and with other pollinators dying from disease, Georgians will have to tolerate the Africanized insects when they arrive, said McCurdy.

"We're going to have to learn to live with them, because we can't do without 'em," he said.

Rap music's 'Cop Killer' focuses attention on lyrics

Continued from page 1A

Rap performers can achieve huge success. And such stars as Ice Cube and N.W.A. can sell more than a million albums even with little or no airplay or exposure on MTV.

Now it's big business.

And the marketplace drives sales, said Danny Goldberg, senior vice president of Atlantic Records. "What we're really doing is responding to a cultural need."

Said David Harleston, president of Def Jam Recordings: "In the last year, you've seen rap really become a mainstream form of music. Rap is an incredible kind of music that is born in a uniquely urban experience."

Companies have been uncomfortable with lyrics under their labels before. Never before, though, have lyrics been so coarse. N.W.A.'s "To Kill a Hooker" makes vivid the abduction and murder of a prostitute, complete with gunfire.

The forthcoming song "F— Rodney King," by rapper Willie D, condemns the black motorist pummeled by white police as a weak sell-out. "They need to beat his ass some mo'" because he urged peace during the Los Angeles riots, the rap song says.

Such recordings ignite sporadic protests, but "Cop Killer" is taking the most intense criticism.

Police blast the song, claiming it encourages killing them; last week law enforcement groups demonstrated against the song at Time Warner's annual meeting.

The public dispute may get record companies to pay more attention to their releases, executives say. But it won't tone down the angry music. As unpalatable as "Cop Killer" may be, they say, it's more distasteful to silence expression.

"We believe in total freedom," said Jerry Heller, president of Ruthless Records, an independent label that's home to N.W.A. "If our artists want to put it out, we're going to support them all the way."

Said Def Jam's Harleston, "Artists need to be free to say and do what they need to say and do."

But an executive at a major label, who spoke on condition of anonymity, said the current climate could force the industry to abandon rap artists, despite their popularity.

"It's very frightening from a record company's standpoint," he said. "It's definitely going to have a chilling effect."

AIDS conference's chair blasts lack of leadership

Continued from page 1A

the conference chairman who preceded Merson at WHO, criticized what he called a lack of lead-

powerless to get their husbands to use condoms, Mann said.

Commissioner. Davis has 13 years of
Tax Office, including 6 years
Commissioner. *There's no substitut*
Davis Minshew has been getting the jol
in the Bibb County Tax Office... a
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Elect Davis
Min

Bibb County Tax Commissioner

Why Waste 70% Of

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- Experienced Trial Lawyer
- Prosecutor, U.S. Department of Justice
- Assistant Dean & Law Professor, Emory
- Argued Successfully Before U.S. Supren
- Speaker & Writer On "Improving Lawye

The Incumbent Will Be Absent For 70% (

Q: Is it true that the term is six years and t
(Sognier) would retire after serving less th

A: Yes. If elected, the incumbent will retir
less than two years of the six year term.
retired for 70% of the term he is runi

Q: If the incumbent is defeated, will it affe

A: No, it will not affect his pensi

No. 92-287

Supreme Court, U.S.
FILED
SEP 14 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

THOMAS G. WALLER AND MYRA L. WALLER, INDIVIDUALLY, AND THOMAS G. WALLER, AS THE ADMINISTRATOR OF THE ESTATE OF MICHAEL JEFFREY WALLER, DECEASED, AND MATTIE K. HAMILTON,

Petitioners,

vs.

OZZY OSBOURNE; CBS INC., CBS RECORDS INC., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the courts below correctly ruled that the prerecorded lyrics of a song which are audible, although not immediately intelligible, are protected by the First Amendment from allegations that such lyrics incite and cause minors to commit suicide.

RULE 29.1 LISTING

Respondent CBS Inc. has no parent company. The following are those subsidiaries and affiliates which are not wholly owned:

Bala Cynwyd Associates
CBS/FOX Stereo Inc.
CBS Gramophone Records & Tapes, Ltd.
Meadowlands Parkway Associates
Network Television Association

Respondent CBS Records Inc. is now known as Sony Music Entertainment, Inc. whose ultimate corporate parents are:

Sony Corporation (Japan)
Sony USA, Inc.

The following are the subsidiaries of Sony Music Entertainment, Inc.:

Sony Music Entertainment (Australia) Pty. Ltd.
Sony Music Entertainment (Austria) Ges. m.b.h.
Sony Music Entertainment (Korea) Inc.
Sony Tune, Inc.
Sony Music Canada, Ltd.
Sony Songs, Inc.
Epic/Sony Music Inc.
Important Record Distributors, Inc.
Portrait/Solar Music, Inc.
Tree Publishing Co., Inc.
Vista Marketing
Raven Records, Inc.
YM Corporation

RULE 29.1 LISTING–Continued

The following are affiliated with Sony Music Entertainment Inc.:

Sony Music Entertainment (Argentina) S.A.I.F.
Sony Music Productions Pty. Ltd.
Sony Music Australia Ltd.
Entertainment Distributors Company Pty.
Music Publishing Co. of Australia Pty. Ltd.
Phonographic Performance Company of Australia Ltd.
Music Services Center Gessellschaft m.b.h.
Sony Music Entertainment (Belgium) S.A./N.V.
Sony Music Endiocoes Musicals Ltds.
SME (Brazil) Industria e Commercia Ltds.
Sony Music Manaus Industria e Commercia Ltds.
Sony Music Canada Inc.
Sony Music Entertainment (Canada) Inc.
Columbia Records Services Inc.
Sony Music Entertainment (Chile) Ltds.
Sony Music Entertainment (Columbia) S.A.
Sony Music Entertainment (Costa Rica) Inc.
CBS Records Limited
Sony Music Entertainment (Denmark) Aps
Grammofonselskaba Distributions Centralan Aps
Sony Music Entertainment (Dominican Republic) S.A.
Sony Music Entertainment (El Salvador) S.A.
Sony Music Entertainment Ltd.
Sony Music Entertainment (Finland) OY
Helsinki Tel. Co.
PEC Musikkitukku
Tempere Tel. Co.
Sony Music Entertainment (France) SA

RULE 29.1 LISTING–Continued

Canal Musique et Fiction (Inactive)
Epic Product
Eurochusique
Gilda S.A.R.L.
Metropolis – FM Frequency Radio
SCPP
Self Music
TV6
Sony Music Publishing GMBH
Sony Music (Germany) B.m.b.h.
Music & More Direct Marketing GmbH
Sony Classical B.m.b.H
Sony Music Entertainment Holdings (Germany) GmbH
CBS Electronics Ltd.
Sony Music Entertainment (Greece) AEBE
Music and Video Enterprises Ltd.
Sony Music Entertainment (Guatemala) S.A.
Sony Music Entertainment (Holland) B.V.
Funokler B.V.
Grammoservice B.V.
CBS Grammophone Records and Tapes Ltd.
April Music SSK (Inactive)
CBS Records SSK (Inactive)
Pakhsh Ahang Iran SSK
Sony Music Entertainment (Italy) S.P.A.
Sony Music Entertainment S.r.1.
Sony Music Entertainment (Kenya) Limited
Sony Music Entertainment (Malaysia) Sdn. Berhad

RULE 29.1 LISTING–Continued

Sony Music Entertainment (Mexico) S.A.
Sony Music Entertainment (New Zealand) Limited
Sony Music Entertainment (Nigeria) Ltd.
Sony Music Entertainment (Norway) A/S
Sony Music Entertainment (Panama) S.A.
Sony Music Entertainment (Peru) S.A.
Sony Music Entertainment (Portugal) Ltda.
Sony Music Entertainment (Puerto Rico) Inc.
Sony Music Entertainment (Singapore) (Ple.) Ltd.
Sony Music Entertainment (Spain) S.A.
Sony Music Entertainment (Sweden) AB
Sony Music Publishing AB
Grammo Rack Service AB
Sklvakademien
Sony Music Columbia A.G.
Sony Music Inc. (Baar)
Sony Music Entertainment (Thailand) Ltd.
CBS Music (Thailand) Limited
Sony Music Entertainment UK Group Ltd.
Deylan Ltd. (formerly CBS Records Ltd.)
Lucal Ltd. (formerly CBS Ltd.)
The Music Club Limited
Sony Music Entertainment United Kingdom Limited
Sony Music Entertainment Holdings Ltd.
Sony Discos Inc.
Columbia Recording Corp.
Cross Keys Publishing Co.

RULE 29.1 LISTING–Continued

Epic Records Inc.
Important Record Distributors, Inc.
Kriven Inc.
Masters International Inc.
Sony Classical Productions, Inc.
Sony International Ltd.
Tree Productions Inc.
Twig Music Inc.
Sony Music/Pace Partnership
Nation Records
Columbia House Company (Canada)
Sony Music Entertainment (Venezuela) C.A.

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STATUTE

O.C.G.A. §16-12-103 12

Respondents John "Ozzy" Osbourne ("Osbourne"), CBS Inc., and CBS Records Inc. (collectively, "CBS"), respectfully request that this Court deny the Petition for writ of certiorari seeking review of the Eleventh Circuit's order affirming the grant of summary judgment by the United States District Court for the Middle District of Georgia.

STATEMENT OF THE CASE

This Petition arises out of the allegations surrounding the unrelated suicides of Michael Jeffery Waller ("Waller") and Harold Matthew Hamilton ("Hamilton"). Separate actions were filed seeking damages from Osbourne and CBS. Both the *Waller* and *Hamilton* cases were disposed of by the United States District Court for the Middle District of Georgia upon the joint summary judgment motions of CBS and Osbourne. The cases were consolidated on appeal to the Eleventh Circuit Court of Appeals where, on May 27, 1992, without further opinion, the District Court's decision was affirmed.

In both *Waller* and *Hamilton* the Petitioners claim that the music of Osbourne and in particular the song "Suicide Solution" caused the suicide of an adolescent. In *Waller*, and initially in *Hamilton*, Petitioners went further, asserting that one portion of the song "Suicide Solution", which is audible but not immediately understandable, contained a "subliminal message" encouraging suicide. The *Hamilton* Petitioner later abandoned this allegation.

Waller: Respondents refer this Court to the district court's opinion reproduced at pages 1-A through 28-A of

the Petition for a restatement of the pertinent facts of *Waller*. Briefly stated, the case was filed by the parents of a young adult who had committed suicide after a period of drinking. Without reiterating all of the details of the case (particularly given that the district court's opinion fully and accurately states the facts of the case) Respondents will only respond to certain misstatements made in the Petition:

Petitioners' recitation of their "experts'" conclusions does not accurately describe the record. The evidence presented to the district court revealed that plaintiffs could not establish that a "subliminal" existed in any of Osbourne's music. The court, plaintiffs' "experts" and counsel thoroughly and exhaustively analyzed all of the master recordings from which Osbourne's album "Blizzard of Ozz" was manufactured and found no subliminal messages. In fact, plaintiffs' "experts" concluded that all of the lyrics on the "Suicide Solution" cassette tape were audible to the naked ear although some were difficult to understand. Plaintiffs' claim became an argument that Osbourne's lyrics were confusing and, based on an incorrect interpretation, socially unacceptable.

Petitioners' expert, Mr. Hall, who believed before the case was filed that a "subliminal" existed on Osbourne's music, was forced to withdraw that opinion and change his conclusion to an utterly meaningless claim that the words were "preconscious suggestions", but not subliminal. The novel term "preconscious suggestions" only meant, according to Mr. Hall, that the lyrics were unclear.

Likewise, the characterization of Ms. Evans' conclusions are misstated in the Petition. Ms. Evans asserted a

wholly contradictory opinion in the district court, rather than anything meaningful to oppose summary judgment. She misused the highly charged term "subliminal" by concluding that Osbourne's music was "subliminal" yet she admitted that she actually heard the lyrics while listening to the cassette tape of the song "Suicide Solution". In other words, although Ms. Evans freely labeled the "28 second interval" as "subliminal" her testimony supported the opposite conclusion, *i.e.*, that the 28 second interval was audible and not subliminal.

The district court determined that the shifting labels used by plaintiffs and their experts could not change the unequivocal facts – that the lyrics may have been unclear but they were certainly audible and were not subliminal. The district court rejected plaintiffs' claims because plaintiffs could only oppose summary judgment with claims that they just did not approve of the social worth of Osbourne's music.

Further, the Petition does not clearly explain what the purported "28 second interval" is truly about. Plaintiffs initially claimed that the "28 second interval" was an audible direction to commit suicide. They said they actually heard the words "get the gun and try it" and "why try, why try" after extensive listening to the cassette tape. Later they amended their complaint to allege that the words in the "28 second interval" were subliminal. Then, during discovery, their experts testified they could hear those lyrics without any special electronic enhancement of the tape. In other words, the lyrics were not hidden, or mysterious; rather, the lyrics were audible, and thus not subliminal.

Discovery also established that this "28 second interval" included the words "bodge" and "get the flaps out" and *not* the words "get the gun and try it" or "why try, why try". The words that plaintiffs and their experts claimed they heard (and which therefore could not be subliminal) were clever interpretations by plaintiffs of words that were not particularly clear. The district court appropriately declined to impose a penalty on anyone for singing and recording unclear lyrics.

Last, Petitioners have misstated the substance of the affidavits of Max Norman (the recording engineer for the "Suicide Solution" song) and Ozzy Osbourne (the vocalist) as well as Mr. Osbourne's testimony by deposition. Those affidavits unequivocally established that Mr. Osbourne did not sing a subliminal message in "Suicide Solution". Petitioners' conclusion that the affidavits do not speak to the issues in the litigation is an inaccurate characterization of the record. Mr. Norman and Mr. Osbourne described under oath the actual lyrics sung during the 28 second interval. Those lyrics did not direct suicide. In addition, the affidavits of Mr. Norman and Mr. Osbourne plainly stated that there was absolutely no manipulation of the tape in any way to change the lyrics on the "Suicide Solution" song. Moreover, by deposition Mr. Osbourne testified that the music contained no subliminals. Those affidavits and the deposition testimony were unrefuted by Petitioners.

The Petition only asks this Court to consider what courts have already uniformly rejected based on the First Amendment: Music is a protected form of speech. Further, Petitioners' claims do not pass muster under *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827 (1969). This is

so because the lyrics of "Suicide Solution" do not advocate anything imminent and because the medium itself reflects recorded statements made years before the listeners hear the lyrics. *Brandenburg* applies to listeners of all ages.

The Petition appears to argue the social worth of Osbourne's music. The Supreme Court should not legislate the musical tastes of the country particularly where the tastes are being twisted by the misinterpretation and misunderstanding of the music at issue. Instead, society should reject music it finds socially unacceptable by not supporting such musicians or by promoting better forms of music among families.

Hamilton: *Hamilton* arose out of the March 1988 suicide of 17-year-old Harold Michael Hamilton who owned the cassette tape of the Osbourne album "Tribute." A live version of the song "Suicide solution" appears on the "Tribute" album but does not contain the 28 second interval. Although the initial complaint alleged, without basis, that the "Tribute" album contained a subliminal, Petitioner's counsel later admitted that no "subliminal" message existed on "Tribute." Petitioner now relies solely on the admitted audible and intelligible lyrics of "Suicide Solution" as the basis for her tort claim.

REASONS WHY THE PETITION SHOULD BE DENIED

1. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTIONS PRESENTED IN THE PETITION.

a. The first and second "Questions Presented" in the Petition address whether "the First Amendment to the Constitution would protect speech which incites or encourages minors to commit suicide." Neither the Eleventh Circuit, nor the United States District Court for the Middle District of Georgia were required to decide that question in this proceeding.

The District Court in *Waller,* and in *Hamilton* by its explicit adoption of the *Waller* decision, held that the Petitioners "failed to demonstrate any manner in which Defendant's music [could be] categorized as speech which incites imminent lawless activity." (Pet. 16A). On appeal, the Eleventh Circuit Court, without further opinion, affirmed the decision of the district court granting Osbourne's and CBS' Motion for Summary Judgment. The district court applied the standard adopted in *Brandenburg v. Ohio,* 395 U.S. 444, 89 S. Ct. 1827 (1969) to determine whether Osbourne's lyrics incited suicide. Incitement was not found and the district court properly granted summary judgment. The question put to this Court was settled by *Brandenburg* and its progeny and as such further review by this Court is inappropriate.

b. The facts of record do not permit the formulation or resolution of the second "Question Presented". Not only are the lyrics Petitioners claim "incite" suicide nonexistent, but the Petitioners' second "Question Presented" seeks a determination by this Court that Osbourne's

music proximately caused the suicide of both Waller and Hamilton. Nothing in the record would support such a determination. Once the district court determined that the speech in question was protected it was unnecessary to reach the issue of causation.

c. The essence of the third "Question Presented" is whether Respondents met their burden of proof on summary judgment by "informing the . . . court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, the admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986). As the record reflects, Osbourne and CBS clearly satisfied this burden.

As discussed above, Respondents produced the affidavits of Osbourne and Norman which provided the actual words sung by Osbourne during the 28 second interval, that the 24-track master tape was not manipulated, and that the album did not contain a subliminal message. This evidence was specifically noted by the district court at the summary judgment hearing. Moreover, the record contains Osbourne's written deposition testimony that "Suicide Solution" does not contain subliminal messages. Respondents also directed the district court to the testimony of Petitioners' own witnesses that the alleged "subliminal" could be *heard* on the commercial cassette of "Suicide Solution". Finally, and most tellingly, Respondent's pointed out the testimony of Mr. Hall, Petitioners' "expert," that the music did not contain a subliminal message. By providing the affidavits of Osbourne and Norman and identifying those portions of

the "pleadings, depositions, answers to interrogatories, and admissions on file," which demonstrated the absence of a genuine issue as to the existence of a subliminal message on the Osbourne album "Blizzard of Ozz," Respondents met their initial summary judgment burden.

Given the Respondents' obvious compliance with their initial summary judgment burden, a determination of the third "Question Presented" by this Court is unnecessary.

2. THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA AND THE ELEVENTH CIRCUIT COURT OF APPEALS FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES.

Petitioners argue that the court of appeals and the district court erred "in failing to recognize . . . an exception . . . under the First Amendment to speech directed to minors which encourages or incites to suicide." However, speech directed or intended to produce imminent lawless action and likely to produce such imminent lawless action is not protected by the First Amendment, as *Brandenburg* and *Hess v. Indiana*, 414 U.S. 105, 74 S. Ct. 326 (1973) hold, regardless of whether it is directed to minors or adults. As such, it was unnecessary and would have been inappropriate for either the district court or the court of appeals to recognize a separate redundant exception for speech directed at any specific group. Given the record created in this action and the decisions of this Court, the district court and the court of appeals were correct in holding that the speech at issue does not fall

within the *Brandenburg* exception and as such is protected by the First Amendment.

Initially, it should be noted that Osbourne's music – including what Plaintiffs identified as unintelligible but audible lyrics – is protected speech under the First Amendment. Entertainment and music are constitutional protected forms of expression. Entertainment as well as political and ideological speech is protected; motion pictures, programs broadcast by radio and television and live entertainment, such as musical and dramatic works fall within the First Amendment's protection. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65, 101 S. Ct. 2176, 2181 (1981) (non-obscene nude dancing). Music, even when it does not contain express and/or audible lyrics, is protected by the First Amendment. *See, e.g., Tacynec v. City of Philadelphia*, 687 F.2d 793 (3rd Cir. 1982), *cert. denied*, 459 U.S. 1172, 103 S. Ct. 819 (1983) (instrumental and choreographed string band performance is a form of expression protected by the First Amendment); *Reed v. City of Shorewood*, 704 F.2d 943, 950 (7th Cir. 1983) ("if the Defendants passed an ordinance forbidding the playing of rock and roll music in the village Shorewood, they would be infringing a First Amendment right . . . "); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 567 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054, 105 S. Ct. 2115 (1985) ("Music is a form of expression that is protected by the First Amendment").

In *Texas v. Johnson*, 491 U.S. 397, 109 S. Ct. 2533 (1989) this Court reiterated the expansive reach of First Amendment Protection, particularly for non-traditional forms of expression: "[W]e have long recognized that its [First Amendment] protection does not end at the spoken or

written word." *Johnson*, 491 U.S. at 404. In *Johnson*, the Supreme Court recognized the broad reach of the First Amendment and held that even the act of burning the American flag was protected expression.

Moreover, even speech which may be emotionally disturbing and even hurtful to some is protected. As explained by the Court in *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 745, 98 S. Ct. 3026 (1978), "[t]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for affording it constitutional protection." *See, Collin v. Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916, 99 S. Ct. 291 (1978) (Nazis have the right to march in a predominately Jewish neighborhood despite that this form of expression would "seriously disturb, emotionally and mentally, at least some and probably many of the village residents."); *Terminiello v. Chicago*, 337 U.S. 1, 5, 69 S. Ct. 896 (1949) (speech that "invites dispute . . . induces a condition of unrest, creates dissatisfaction with conditions as they are or even stirs people to anger [was] among the high purposes of the First Amendment.") *Erznoznik v. Jacksonville*, 422 U.S. 205, 210, 95 S. Ct. 2268 (1975) ("Much that we encounter offends our aesthetic, if not our political and moral sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.")

Osbourne's music, albeit "heavy metal" rock music, which Petitioners contend is morally wrong, unquestionably constitutes speech and/or "expression" which is protected under the ambit of the First Amendment. As

noted above the only exception urged upon this court by Petitioners is that of speech which incites imminent lawless activity.

Petitioners contend that the lyrics of the Osbourne song "Suicide Solution" incited Waller and Hamilton to commit suicide. However, nowhere is it explained how Osbourne's lyrics fit within the *Brandenburg* exception. In *Brandenburg* this Court held:

> [t]he constitutional guarantees of free speech or free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S. Ct. 1827, 1829 (1969). In *Hess v. Indiana*, 414 U.S. 105, 94 S. Ct. 326 (1973) this Court found that the statement "We'll take the fucking street later (or again)", when made in connection with an anti-war demonstration, was protected speech not falling within the *Brandenburg* exception. The statement "amounted to nothing more than advocacy of illegal action at some indefinite future time." Continuing, this Court added:

> Since there was no evidence, or rational inference from the import of the language that [the] words were intended to produce, and likely to produce, *imminent* disorder, those words could not be punished by the State on the ground that they had "a tendency to lead to violence".

Hess, 414 U.S. at 108-09. It is irrational to contend that prerecorded lyrics command or are likely to produce a

suicidal act. Even if it were presumed that the pre-recorded lyrics were intended to "incite", the static nature of a recording removed in time from the act, would not provide the "immediacy" necessary under *Brandenburg* and *Hess* to strip the speech of its First Amendment protection. As stated in *McCollum v. CBS Inc.*, 249 Cal. Rptr. 187, 193 (Cal. App. 2d Dist. 1988) "[n]one of the lyrics relied upon by plaintiffs, even accepting their literal interpretation of the words, purport to order or command anyone to any concrete action at any specific time, much less immediately."

Without making any attempt to contend with, or even recognize the deficiencies of their case in light of *Brandenburg*, Petitioners launch into a discussion of numerous cases which they insist support a limitation of Osbourne's First Amendment rights when children are involved. Petitioners seem to advocate a new exception using an alternative definition of "incitement" to strip First Amendment protection from speech to which children may be exposed.

The cases cited to support a new exception are inapposite. Initially, Petitioners rely on a recent Eleventh Circuit decision, *American Book Sellers, et al. v. Webb*, 919 F.2d 1493 (11th Cir. 1990) *reh'g den'd*, 930 F.2d 925 (11th Cir. 1991). In *Webb*, the Eleventh Circuit considered a Georgia statute (O.C.G.A. §16-12-103) which makes it a criminal offense to display in a place accessible to minors any material deemed "harmful to minors". The Court initially noted that "content based restrictions on speech survived constitutional scrutiny only under extraordinary circumstances." 919 F.2d at 1500. Moreover, the *Webb* court noted that, "the State's interest in protecting its youth justifies a

limited burden on free expression" and that absent impermissible burden on adults, "States may deny minors access to materials obscene to them." *Id.* The Court ruled, however, that "it is clear that a State may not prohibit an adult's access to material that is obscene for minors but not adults." *Id.* Statutes which create an "indirect burden on adults' First Amendment right to have access to materials not obscene for adults must be narrowly drawn." *Id.* The "regulation must leave open adequate alternative channels, must not restrict expression at the source, and must not impose 'significant' restrictions on adult access." *Id.* (Citations omitted). The key issues to be decided were whether the restriction on the adult access was unnecessarily burdensome or significant and whether alternative means of adult access were unduly restricted. Because the Eleventh Circuit found that blinders could be used to comply with this statute, allowing adults to readily locate and purchase the materials that were not obscene as to them, it held that the statute was narrowly drawn and constitutional. In contrast, the exception and corresponding civil liability sought by Petitioners would cut expression off at its source, totally prohibiting adult access to the music of Mr. Osbourne and numerous other artists.

Moreover, under the standards established in *Webb*, this music is not "harmful to minors" and thus no restriction on a minor's First Amendment rights is justified. *Webb* holds that "if any reasonable minor, including a seventeen year old would find serious value [in the material], the material is 'not harmful to minors'." 919 F.2d at 1504-1505. Thus, "if a work is found to have serious

literary, artistic, political or scientific value for a legitimate minority of normal, older adolescents, then it cannot be said to lack such value for the entire class of juveniles taken as a whole." *Id.* (Citation omitted). Obviously, it is quite likely that a minority, if not a majority, of minors could find some serious artistic value in this and similar music.

Petitioners also rely on *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 109 S. Ct. 2829 (1989) and *Butler v. Michigan*, 352 U.S. 380, 77 S. Ct. 524 (1958). In *Sable Communications*, this Court was asked to rule on the constitutionality of § 223(b) of the Communications Act of 1934 which banned indecent or obscene interstate commercial telephone messages. The necessity of protecting children from exposure to indecent dial-a-porn messages was advanced as the government's interest supporting a total ban on such speech. *Sable*, 109 S. Ct. at 2836. The government argued that a total ban on such speech was justified because nothing less could prevent children from gaining access to such messages. *Sable*, 109 S. Ct. at 2837. In holding the ban unconstitutional this Court stated: "in its present form [the total ban] has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear. It is another case of 'burn(ing) up the house to roast the pig.' " *Sable*, 109 S. Ct. at 2839, *quoting Butler v. Michigan*, 352 U.S. at 383. As in the case of the Eleventh Circuit's decision in *Webb*, this Court's decision in *Sable* prohibits broad based content restrictions on speech for the protection of minors, at the expense of the general population's First Amendment rights.

Curiously, Petitioners also cite *Butler v. Michigan*, 352 U.S. 380 (1957) in their attempt to suppress Osbourne's expression. In *Butler*, this court was asked to pass judgment on a criminal statute prohibiting the distribution of reading materials, pictures or "*recordings*, containing obscene, immoral, lewd or lascivious language, . . . *tending to incite minors* to violent or deprived or immoral acts . . . ". (Emphasis added) The statute sought to restrict freedom of expression under the same terms that Petitioners now urge on this Court. *Butler v. Michigan*, 532 U.S. at 381. In reversing a conviction under the statute, Justice Frankfurter stated "[t]he incident of this [restriction] is to reduce the adult population . . . to reading only what is fit for children." *Id.* at 383-384. Further, such restriction "arbitrarily curtails one of those liberties of the individual, . . . that history has attested as the indispensable conditions for the maintenance and progress of a free society." *Id.* at 384.

Finally, an attempt is made to analogize the recent decision in *Osbourne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691 (1990) to the position the Petitioners now advocate. Such analogy cannot withstand careful scrutiny. The decision in *Osbourne* upheld an Ohio criminal statute prohibiting the possession of nude photographs of minors. The holding was supported by the State's proffered interest of protecting the psychological and physiological condition of minors. *Id.* at 1696. However, justifying the restriction was not the need to keep such materials out of minors' hands, but the prevention of the exploitation of the adolescents actually pictured. *Id.* at 1696-97. Obviously, a different and stronger case exists for restrictions on

expression which seek to derive profit from the exploitation and sexual abuse of children than for restrictions on lyrics directed at the general population. The expression in the instant case is not dependent on the exploitation and abuse of children, and as such the rationale for the total ban on speech in *Osbourne* is inapplicable.

The cases cited to support the argument that the First Amendment does not preclude tort liability are likewise easily distinguishable from the cases at bar. They in fact support the correctness of the decision below. As such they are worthy of only a limited response.

In *Olivia N. v. National Broadcasting Company, Inc.*, 141 Cal. Rptr. 511 (Cal. App. 2d Dist. 1977), it was alleged that a young girl was attacked and "artificially raped" with a bottle by minors who had viewed a similar scene in a television program broadcast by NBC. It was alleged that the young girl's injuries were proximately caused by the telecast. As in the cases at bar it was contended (1) that tort liability could constitutionally be imposed despite the absence of "incitement" as defined by *Brandenburg* or (2) that an alternative definition of "incitement" should be applied. After viewing the film in question the trial judge in *Olivia N.* determined that the acts depicted did not constitute incitement and dismissed the case.

The appeals court reversed and remanded because, while the trial judge's act, of finding as a matter of law that incitement did not exist, would have been appropriate had a summary judgment motion been pending, it was inappropriate in *Olivia N.* since no summary judgment motion was pending. For this reason alone the

plaintiff was given an opportunity to demonstrate "*Brandenburg* incitement" at trial. Thus, *Olivia N.* offers no support for the assertion that "incitement" is under all circumstances a jury question. In both *Waller* and *Hamilton* a proper summary judgment motion was pending and the District Court was well within its right to make a finding on "incitement" as a matter of law.

Petitioners also cite *Weirum v. RKO General, Inc.* 15 Cal. 3d 40, 123 Cal. Rptr. 468, 539 P.2d 36 (1975). Importantly, *Weirum* was discussed and distinguished by the California Court of Appeal not only in *Olivia N. v. National Broadcasting Company, Inc.*, 178 Cal. Rptr. 888 (1981), *cert. denied.*, 458 U.S. 1108 (1982), but also in *McCollum v. CBS*, 249 Cal. Rptr. 187 (Cal. App. 1988), *review denied*, 202 Cal. App. 3d 989 (Cal. 1988). In *McCollum* the California Court of Appeal correctly distinguished between the live, on-the-air encouragement of contestants to race in *Weirum* and the fixed recorded lyrics of a song on a record album as a basis for tort liability.

Finally, Petitioners attempt to distinguish *Waller* and *Hamilton* from the well-reasoned decision of the California Court of Appeal in *McCollum v. CBS Inc.* Initially Petitioners made virtually the same allegations considered by the *McCollum* Court, and therefore no meaningful distinction between the two cases can be made. In *McCollum*, it was alleged that a young man committed suicide and that Osbourne's music was the direct and proximate cause of that suicide. *McCollum*, 249 Cal. Rptr. at 187. The Court considered the First Amendment protection of the song "Suicide Solution," including the "not immediately intelligible" words in the 28 second interval

contained in that song, as the alleged proximate cause of the decedent's suicide. Thus, precisely the same alleged words at issue in *Hamilton* and *Waller* and which Petitioners label "subliminal," were specifically addressed and determined to be protected by the First Amendment.

The *McCollum* court correctly held that under *Brandenburg, supra,* Osbourne's lyrics and music (even the 28 second interval) were protected speech because the lyrics did not "command anyone to any concrete action at any specific time, much less immediately." *McCollum,* 249 Cal. Rptr. at 193. As explained in *McCollum*

> Merely because art may evoke a mood of depression as it figuratively depicts the darker side of human nature does not mean that it constitutes a direct "incitement to imminent violence." The lyrics sung by Osbourne may well express a philosophical view that suicide is an acceptable alternative to a life that has become unendurable – an idea which, however unorthodox, has a long intellectual tradition. [Footnote omitted]. If that is the view expressed as Plaintiffs apparently contend, the Defendants are constitutionally free to advocate it.

McCollum, 249 Cal. Rptr. at 194.

Plainly there is no distinction between *McCollum* and the cases at bar. The "masked" lyrics, even as understood by the *Waller* Petitioners and their experts, simply do not constitute "incitement" as explained in *McCollum,* irrespective of the label placed on the lyrics or the irrational response of the decedents.

Thus, after a review of the existing case law, it is absolutely clear that the music of Mr. Osbourne is protected by the First Amendment and cannot be punished

through a civil suit for damages. As the record reflects, Petitioners failed to make their case below. Therefore, the courts below correctly decided the issues and held in favor of freedom of expression and against censorship.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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